(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: AUG 25 2015

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before us on motion to reopen. The motion will be dismissed.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business. The petitioner seeks employment as a VPD (vapor phase decomposition) engineer for The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies for classification as an alien of exceptional ability, and therefore declined to make a determination as to whether an exemption from the requirement of a job offer would be in the national interest of the United States. In our appellate decision dated January 16, 2015, we upheld the director's determination.

On motion, the petitioner submits a statement addressing our appellate decision and additional evidence.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
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> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
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> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As stated above, the petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following categories of evidence, at least three of which an individual must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Furthermore, the regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides that "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

The submission of evidence relating to at least three criteria does not, in and of itself, establish eligibility for this classification. *See Matter of Chawathe*, 25 I&N Dec. at 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that U.S. Citizenship and Immigration Services (USCIS) examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true."); *see also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination).[1] *See generally Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-80 (1994) (explaining that the term "burden of proof" includes a burden of persuasion).

II. ANALYSIS

The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) on October 24, 2012. In Part 6, line 2 of the Form I-140, the petitioner identified his occupation's Standard Occupational Classification (SOC) Code as 41-9031, which corresponds to sales engineers. An adjacent notation

[1] The immigrant visa classification at issue in *Kazarian,* section 203(b)(1)(A) of the Act, requires qualifying evidence under three criteria in the same manner as the classification at issue in this matter, section 203(b)(2) of the Act.

indicated: "The SOC code can also be: 17-2141.00 Mechanical Engineers." On motion, the petitioner asserts that he meets the categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii)(B), (D), and (F).[2]

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.*

The evidence supports our previous determination that the petitioner has met this requirement.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.*

The petitioner initially submitted pay receipts from the third quarter of 2012 showing a salary of $4,917.50 per month, which extrapolates to $59,010 per year. The petitioner also submitted Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Returns, jointly filed by the petitioner and his spouse reflecting partnership income of $65,663 in 2010 and $93,435 in 2011, and a loss of $6,878 in 2012. It is the petitioner's spouse, however, and not the petitioner, who is a partner in (she owns 70% of the business) and therefore entitled to a share of its profits. Thus, the company's profits and partnership income in 2010 and 2011 were not the petitioner's remuneration.

On motion, the petitioner submits IRS Form W-2, Wage and Tax Statements, from reflecting earnings of $59,010 in 2010 and 2011, $60,963 in 2012, $82,451 in 2013, and $75,580 in 2014. The petitioner's earnings from 2013 and 2014 post-date the filing of the Form I-140 on October 24, 2012. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Accordingly, we cannot consider any salary or remuneration received by the petitioner after October 24, 2012, as evidence to establish his eligibility at the time of filing.

The petitioner's motion includes "Online Wage Library" Foreign Labor Certification "Wage Search Results" for Oregon and Washington indicating that the Level 4 (fully competent) yearly prevailing wages for "Electronics Engineers," "Sales Engineers," "Mechanical Engineers," and "Architectural and Engineering Managers" were $119,496, $126,464, $96,304, and $156,520, respectively.[3] The aforementioned amounts are substantially above the petitioner's earnings of $59,010 in 2010 and 2011, and $60,963 in 2012. As the petitioner's earnings in 2010, 2011, and 2012 were significantly below the wages paid to the majority of engineers in his metropolitan area, the evidence submitted on motion does not demonstrate that the petitioner has commanded a salary, or other remuneration for services, which demonstrates his exceptional ability at the time of filing.

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[2] We have reviewed all of the evidence the petitioner has submitted on motion and will address those criteria the petitioner asserts that he meets or for which the petitioner has submitted relevant and probative evidence.

[3] A "prevailing wage" is defined as "trade and public work wages paid to the majority of workers in a specific area." *See* http://www.businessdictionary.com/definition/prevailing-wage.html, accessed on July 22, 2015, copy incorporated into the record of proceeding.

In addition, the petitioner submits a February 2015 employment agreement with offering him a future "share in the profits and ownership of the company" contingent upon selling at least three VPD machines in 2015 and his successful development of two engineering processes in 2016. The petitioner also provides a "Business Evaluation of as of 12/31/2014" and a copy of his IRS Form 1040 for 2013. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, we cannot consider the income listed on the petitioner's 2013 IRS Form 1040, valuation as of December 2014, and the petitioner's potential future remuneration in 2015 or 2016 as evidence to establish his eligibility at the time of filing.

In light of the above, we affirm our prior determination that the petitioner has not established that he meets this regulatory criterion.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.*

As evidence of recognition for achievements and significant contributions to the industry or field, the petitioner submitted letters of support written by his peers. On motion, the petitioner asserts that our appellate decision was "dismissive of the supporting letters because they are from peers in the industry, rather than from government agencies or professional or business associations." Our January 2015 decision considered the letters submitted from the petitioner's peers, but those letters were not were of limited probative value, not because they were from other than governmental entities, or professional or business organizations, but rather, as will be further explained below, because they were not sufficient to demonstrate recognition for achievements and significant contributions to the industry.

The petitioner asserts on motion:

> The Denial misses the point that this is a niche industry and that there simply is no other preexisting evidence as the Service might see in other industries with many producers of a certain type of machinery, and so this beneficiary must rely on comparable evidence, especially in the form of support letters. . . . The beneficiary explained in the initial petition that the very small universe of engineers with these skill sets relating to VPD testing requires the consideration of comparable evidence since the typical sources of evidence do not exist.

As discussed in our appellate decision, the petitioner's initial submission included letters from a number of his former co-workers and clients. Some of these individuals attested, in general terms, to the petitioner's skill and expertise, while others referred to the petitioner's work on specific projects. As an example of the latter, section manager at stated that the petitioner is "one of the only [*sic*] engineers who [are] capable of servicing" an unidentified "million dollar analysis tool." In his initial August 2013 letter, a Lab Manager for and a co-inventor named on a patent application with the petitioner, asserted that the petitioner performed repairs and enhancements on "a million dollar tool" used by that company. The aforementioned letters did not identify any specific achievements or contributions to the industry or field.

Additional letters mentioned the petitioner's work as a support technician and developer of VPD equipment, but they did so in very general terms, without providing specific examples of achievements or contributions that have influenced the industry or field. For example, Principal Engineer, stated that he hired the petitioner to perform a repair that the initial VPD tool manufacturer was unable to perform, and that the petitioner's work "was so superior" that "he earned the service contract" at another of the company's factories. further stated that "VPD tools are a highly specialized piece of analytical equipment" and that the petitioner's "U.S. presence is a great convenience to because it allows for rapid response to any issues or faults that such a highly complex machine may manifest." Quality Assurance Senior Engineer, asserted that the petitioner maintains "highly complex machines" that are essential to his plant's operation and that the petitioner is "the only person in the U.S. with the necessary training and experience" for maintaining the company's Autoscanners. The individuals quoted above praise the petitioner's expertise in maintaining complex equipment for their companies, but they do not offer specific examples of achievements and significant contributions to the industry or field.

On motion, the petitioner submits a February 2015 letter from asserting that uses the patented HBB technology that he co-developed with the petitioner. states:

> We have used this technology in the key area of monitoring semiconductor chip wafer production quality since More precisely, the HBB technology provides the methodology to analyze the wafer bevel and back side contamination levels.
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> * * *
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> The HBB system is a breakthrough technology since it overcomes the limitations of conventional VPD systems. A conventional VPD technology can only analyze the front wafer surface, but not the wafer bevel and wafer backside. With the invention of the HBB system, is able to monitor the contamination levels down to 1E8 atoms/cm^2. This technology also reduces waste in the silicon wafer process which leads to a decrease in production costs.
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> [The petitioner] has made a major contribution to the semiconductor industry with the development of this novel invention.

Although the petitioner's HBB technology contributes to ability to monitor its semiconductor chip wafer production quality, there is no documentary evidence demonstrating that the technology was recognized beyond the company such that the petitioner's work constitutes achievements and significant contributions to the industry or field. The plain language of the regulation requires "achievements and significant contributions to the industry or field" rather than just the petitioner's client or employer.

The petitioner submitted letters of varying probative value. We have addressed the specific assertions above. Generalized conclusory assertions that do not identify specific achievements or significant contributions and their impact in the industry or field have little probative value. *See 1756, Inc. v. U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.D.C. 1990) (holding that an agency need not

credit conclusory assertions in immigration benefits adjudications). *See also Visinscaia v. Beers*, 4 F.Supp.3d 126, 134-35 (D.D.C. 2013) (upholding USCIS' decision to give limited weight to uncorroborated assertions from practitioners in the field); *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (holding that an agency "may, in its discretion, use as advisory opinions statements . . . submitted in evidence as expert testimony," but is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought and "is not required to accept or may give less weight" to evidence that is "in any way questionable"). The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the beneficiary's eligibility. *Id. See also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

The petitioner has not overcome our prior finding regarding recognition for achievements and significant contributions. Had the petitioner done so, he still would not have satisfied three of the six regulatory standards for exceptional ability as required by 8 C.F.R. § 204.5(k)(3)(ii).

B. Summary

For the reasons discussed above, the petitioner has not submitted the requisite initial evidence, in this case, evidence that satisfies three of the six regulatory criteria.

III. CONCLUSION

The petitioner has not satisfied at least three of the six evidentiary standards specified at 8 C.F.R. § 204.5(k)(3)(ii). Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. As the petitioner has not done so, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122. Nevertheless, although we need not provide the type of final merits determination referenced in *Kazarian,* a review of the evidence in the aggregate supports a finding that the petitioner has not demonstrated the level of expertise required for the classification sought.[4]

Furthermore, because the director made no initial determination regarding the national interest waiver, and because we have affirmed our finding regarding the petitioner's ineligibility for the underlying classification as an alien of exceptional ability, a *de novo* determination regarding the national interest

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[4] We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii); *see also* INA §§ 103(a)(1), 204(b); DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

waiver claim would not change the outcome of our decision and, therefore, would serve no constructive purpose. The petitioner cannot qualify for the national interest waiver without first qualifying for the underlying classification.

The new evidence submitted on motion does not overcome the grounds underlying our previous decision. In this matter, the petitioner has not established eligibility as an alien of exceptional ability pursuant to section 203(b)(2)(A) of the Act and the petition may not be approved.

We will affirm our prior decision for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion to reopen is dismissed.